

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SCOTT C. SMITH,

Plaintiff,

v.

GINA PENROSE, LT. CREWSE,
RICHARD MORGAN, MARGE
LITTRELL, LYNNE DELANO,
ELDON VAIL, and JAMES
HARTFORD,

Defendants.

NO. CV-06-0148-LRS

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND GRANTING
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS**

BEFORE THE COURT are Plaintiff's Motion for Partial Summary Judgment Re: Crewse(**Ct. Rec. 80**), and Defendant's Motion for Judgment on the Pleadings (**Ct. Rec. 88**). These motions came at issue without oral argument. After a detailed review of the pleadings submitted by both parties, this Court finds that Plaintiff's Motion for Partial Summary Judgment is **DENIED**, and the DOC officials are entitled to judgment on the pleadings as a matter of law. The Court notes that Defendant Gina Penrose has already been dismissed from this case as a matter of law. See Ct. Rec. 104.

1 **I. BACKGROUND**

2 Plaintiff is a Washington State prison inmate currently
3 incarcerated at the Stafford Creek Corrections Center (SCCC).
4 Plaintiff alleges that his Constitutional rights were violated when he
5 was retaliated against by Defendants Crewse, Morgan, Littrell, Vail
6 and Hartford for reporting an alleged assault when he was incarcerated
7 at the Washington State Penitentiary in Walla, Walla. See Complaint.
8 (Ct. Rec. 1).

9 Plaintiff alleges that Gina Penrose, a Department of Corrections
10 Classification Counselor, attempted to "engage [Plaintiff] in sexual
11 activity in exchange for a custody promotion, facility transfer and
12 earned time credits." *Id* at 7. Plaintiff further alleges that, upon
13 his refusal to engage in sexual activity with Defendant Penrose,
14 Defendant Penrose threatened Plaintiff by telling him "you'll never
15 get a promotion or transfer". *Id* at 7. Plaintiff alleges that the
16 sexual assault violated his rights under the Eighth Amendment of the
17 Constitution *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004))
18 and was prohibited under RCW 9a.44.160. See *Complaint*.

19 Plaintiff further alleges that Defendant Penrose retaliated
20 against him by making recommendations to deny a custody promotion,
21 facility transfer, earned time credits, and by later inappropriately
22 acting as the Classification Chairperson and approving her own
23 recommendations.

24 Plaintiff also alleges that Defendants Crewse, Morgan, Littrell,
25 Vail and Hartford unlawfully retaliated against him by intercepting
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1 and confiscating Plaintiff's mail on four occasions, threatening
2 Plaintiff with isolation time and being labeled a 'snitch,' placing
3 Plaintiff in involuntary protective custody, placing Plaintiff in
4 Administrative Segregation, finding Plaintiff guilty of a disciplinary
5 infraction, placing Plaintiff in disciplinary isolation for ten days,
6 transferring Plaintiff to the IMU subjecting Plaintiff to repeated
7 cell moves, searches, strip searches, and level demotions, and
8 transferring Plaintiff to SCCC. *Id.* Hearing Officer Crewse was the
9 hearing officer at Mr. Smith's disciplinary hearing. Crewse alleges
10 that at the December 14, 2005 disciplinary hearing, Plaintiff's due
11 process rights were violated. Ct. Rec. 81 at 2.

12 13 **II. DISCUSSION**

14 **A. LEGAL STANDARDS**

15 **1. Summary Judgment**

16 Summary judgment is proper only if "the pleadings, depositions,
17 answers to interrogatories, and admissions on file, together with the
18 affidavits, if any, show that there is no genuine issue as to any
19 material fact and the moving party is entitled to judgment as a matter
20 of law." Fed.R.Civ.P. 56c. The moving party bears the burden of
21 proving that no genuine issue of material fact exists. *See Matsushita*
22 *Elec. Indus. Co. V. Zenith Radio Corp.*, 475 U.S. 574, 586 n. 10
23 (1986). "Facts that could alter the outcome are 'material,' and
24 disputes are 'genuine,' if evidence exists from which a rational
25 person could conclude that the position of the person with the burden
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1 of proof on the disputed issue is correct." *Horowitz v. Fed. Kemper*
2 *Life Assurance Co.*, 57 F.3d 300, 302 n.1 (3rd Cir. 1995) (internal
3 citations omitted). If the moving party has demonstrated an absence
4 of material fact, the nonmoving party then "must come forward with
5 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*,
6 475 U.S. at 587 (quoting Fed.R.Civ.P. 56(e)). The court
7 will "view the underlying facts and all reasonable inferences
8 therefrom in the light most favorable to the party opposing the
9 motion." *Pa. Coal Ass'n v. Babbitt*, 63 F.3d 231, 236 (3rd Cir. 1995).
10 The mere existence of some evidence in support of the nonmoving party,
11 however, will not be sufficient for denial of a motion for summary
12 judgment; there must be enough evidence to enable a jury reasonably to
13 find for the nonmoving party on that issue. See *Anderson v. Liberty*
14 *Lobby, Inc.*, 477 U.S. 242, 249 (1986). Mere disagreement or the bald
15 assertion that a genuine issue of material fact exists will not
16 preclude the use of summary judgment. *California Architectural*
17 *Building Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466,
18 1468 (9th Cir. 1987), cert. denied, 484 U.S. 1006 (1988). If the
19 nonmoving party fails to make a sufficient showing on an essential
20 element of its case with respect to which it has the burden of proof,
21 the moving party is entitled to judgment as a matter of law. *Celotex*
22 *Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

23 **2. 42 U.S.C. § 1983**

24 To state a claim under 42 U.S.C. § 1983, at least two elements
25 must be met: (1) the defendant must be a person acting under color of
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1 state law, (2) and his conduct must have deprived the plaintiff of
2 rights, privileges or immunities secured by the constitution or laws
3 of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).
4 Implicit in the second element is a third element of causation. See
5 *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 286-87, (1977);
6 *Flores v. Pierce*, 617 F.2d 1386, 1390-91 (9th Cir. 1980), *cert.*
7 *denied*, 449 U.S. 975 (1980). When a plaintiff fails to allege or
8 establish one of the three elements, his complaint must be dismissed.

9 **3. Standard for Judgment on the Pleadings**

10 After the pleadings are closed, but within such time as not to
11 delay trial, any party may move for judgment on the pleadings pursuant
12 to Fed. R. Civ. P. 12c. In reviewing a motion to dismiss under either
13 Fed. R. Civ. P. 12c or Fed. R. Civ. P. 12(b)(6), a court may grant a
14 dismissal for failure to state a claim "if it appears beyond doubt that
15 the plaintiff can prove no set of facts in support of his claim that
16 would entitle him to relief." *Keniston v. Roberts*, 717 F.2d 1295, 1300
17 (9th Cir. 1983) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).
18 "Dismissal can be based on the lack of a cognizable legal theory or the
19 absence of sufficient facts alleged under a cognizable theory."
20 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

21 On a motion to dismiss, material allegations of the complaint are
22 taken as admitted and the complaint is to be liberally construed in
23 favor of the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421
24 (1969), *reh'g denied*, 396 U.S. 869 (1969); *Sherman v. Yakahi*, 549 F.2d
25 1287, 1290 (9th Cir. 1977). Where a plaintiff is proceeding pro se,
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1 his allegations must be viewed under a less stringent standard than
2 allegations of plaintiffs represented by counsel. *Haines v. Kerner*,
3 404 U.S. 519 (1972), reh'g denied, 405 U.S. 948 (1972). While the
4 court can liberally construe a pro se plaintiff's complaint, it cannot
5 supply an essential fact that the plaintiff has failed to plead. *Pena*
6 *v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992) (quoting *Ivey v. Board of*
7 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). A
8 motion to dismiss only admits, for the purposes of the motion, all well
9 pleaded facts in the complaint, as distinguished from conclusory
10 allegations. *Mitchell v. King*, 537 F.2d 385, 386 (10th Cir. 1976); see
11 also *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th
12 Cir. 1984) (conclusory allegations unsupported by facts are
13 insufficient to state a claim under 42 U.S.C. § 1983).

14 **B. PLAINTIFF'S CLAIMS ARE BARRED BY THE FAVORABLE TERMINATION**
15 **DOCTRINE**

16 As Defendants argue in their motion for judgment on the pleadings,
17 a prisoner may not bring a 42 U.S.C. § 1983 claim for damages if the
18 judgment in his favor would "necessarily imply the invalidity of the
19 punishment imposed" at a prison disciplinary hearing. *Edwards v.*
20 *Balisok*, 520 U.S. 641, 649 (1997). In that case, the prisoner alleged
21 that he was found guilty at a prison disciplinary hearing because of
22 what he considered to be deceit and bias on the part of the hearing
23 officer. *Id.* at 649. The Supreme Court held that allegations of
24 deceit and bias were insufficient to state a claim under 42 U.S.C.
25 §1983 if the prisoner had not already demonstrated that the guilty
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1 finding was previously invalidated by a favorable ruling for the
2 prisoner in a personal restraint petition. In this instance, Mr. Smith
3 cannot show that he filed a successful personal restraint petition
4 relating to the December 2005 prison disciplinary hearing. Therefore,
5 Plaintiff's claims regarding the prison disciplinary hearing are
6 dismissed.

7 **C. PLAINTIFF'S RETALIATION CLAIM FAILS**

8 This Court agrees with Defendants that Plaintiff cannot
9 demonstrate that retaliation was a substantial or motivating factor
10 behind any of the actions that Plaintiff claims occurred. The Ninth
11 Circuit has long held that, though prisoners do not have a
12 constitutional right to particular custody level or facility
13 placements, transfers and demotions may violate a prisoner's First
14 Amendment rights if they are motivated by a desire to curtail a
15 prisoner's protected speech activities. *Pratt v. Rowland*, 65 F.3d 802,
16 806 (9th Cir. 1995). To find that such a violation has occurred,
17 Plaintiff must show that "the prison authorities' retaliatory action
18 did not advance legitimate goals of the correctional institution or was
19 not tailored narrowly enough to achieve such goals." *Id.* Plaintiff
20 must also show that his constitutional rights were actually chilled.
21 *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000). Retaliation
22 claims must be evaluated with the deference accorded to prison
23 officials. *Pratt*, 65 F.3d at 807. Absent factual support, bare
24 allegations of retaliation are insufficient. *Rizzo v. Goode*, 423 U.S.
25 362, 378 (1976). The record supports the position of Defendants that
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1 the reason that Mr. Smith was not promoted to a lower custody (less
2 restrictive) level included his behavior and the material contained in
3 the Plaintiff's central file, not because of any retaliation or
4 animosity any of the named Defendants harbored for the Plaintiff.

5 A plaintiff's belief that a defendant acted from an unlawful
6 motive, without evidence supporting that belief, is no more than
7 speculation or unfounded accusation about whether the defendant really
8 did act from an unlawful motive." *Carmen v. San Francisco Unified*
9 *School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001). In addition, as
10 noted in the earlier order granting Defendant's motion for summary
11 judgment, the Court notes that Plaintiff cannot show any injury
12 because of any of the Defendants' actions. Inmates may appeal their
13 Classification decisions through five levels of review within the
14 Washington State Department of Corrections. Plaintiff's fourth level
15 of review was performed by Correctional Program Manager Carla
16 Schettler, who did not concur with Defendant Penrose's recommendations,
17 and changed them to allow Plaintiff to be promoted to medium custody
18 after Plaintiff completed the review process.

19 **D. PLAINTIFF'S STATE CLAIMS**

20 Plaintiff includes several ethical violations for those
21 individuals involved in state service on behalf of the Defendants. The
22 law governing such behavior is found in RCW 42.52. As counsel for the
23 Defendant correctly points out, a citizen may not bring an action under
24 RCW 42.52 until he has notified the ethics board and the Attorney
25 General and they have failed to commence an investigation. RCW
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1 42.52.460. Mr. Smith has not complied with the statute, and therefore,
2 his claims are dismissed, accordingly.

3 In addition, Plaintiff makes several allegations under the
4 Washington Criminal Code. Any alleged criminal conduct is outside the
5 jurisdiction of this Court. RCW 36.27.020(4). Therefore, these claims
6 are dismissed.

7 **E. PLAINTIFF'S MOTIONS FOR DEFAULT**

8 Plaintiff has filed two motions for default as to Lynne Delano
9 (**Ct. Recs. 96 and 107**). Counsel for Defendants has responded to the
10 motions for default by explaining that Lynne Delano was never served
11 with the lawsuit. Ms. Delano is currently serving in the Peace Corps
12 in Romania, and the Department of Corrections does not have a
13 forwarding address for her. (**Ct. Rec. 98**). As Ms. Delano was never
14 personally served with the summons and complaint as required by Fed R.
15 4 c(1), and Plaintiff has not provided a proof of service for Ms.
16 Delano, this Court lacks jurisdiction over Ms. Delano. The claims
17 against Ms. Delano are **DENIED WITHOUT PREJUDICE**.

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19 **III. CONCLUSION**

20 For the reasons explained above, **IT IS HEREBY ORDERED:**

21 1. Plaintiff's Motion for Partial Summary Judgment (**Ct. Rec. 80**)
22 is **DENIED**. Defendant's Motion for Judgment on the Pleadings (**Ct. Rec.**
23 **88**) is **GRANTED**. All of Plaintiff's claims against all remaining
24 Defendants except Lynne Delano are **DISMISSED WITH PREJUDICE**. As noted
25 above, the claims against Ms. Delano are **DISMISSED WITHOUT PREJUDICE**.

DATED this 20th day of August, 2007.